APPENDIX

Opinion of the Supreme Court of Virginia dated March 4, 1974.

Present: All the Justices

OPINION BY JUSTICE GEORGE M. COCHRAN
Richmond, Virginia, March 4, 1974

FRED WILLIAM QUICK, JR.
-v-
Record No. 730262

WILLIAM M. HARRIS,
SHERIFF OF NELSON COUNTY,
AND THE SUPERINTENDENT OF
THE VIRGINIA STATE PENITENTIARY

FROM THE CIRCUIT COURT OF
NELSON COUNTY
C. G. Quesenbery, Judge Designate

This appeal presents for our determination the novel question whether a man accused of a criminal offense has standing to challenge the systematic exclusion of women from the jury process. The matter comes before us in a habeas corpus proceeding.

Fred William Quick, Jr. was convicted on April 14, 1970, of breaking and entering and petit larceny and was sentenced to confinement for one year and for twelve months, respectively, the sentences to run consecutively. We refused to grant him a writ of error entered June 15, 1971. Quick's petition for a writ of certiorari was denied by order of the United States Supreme Court of April 3, 1972. His petition for a writ of habeas corpus, in which for the first time he alleged, among other things, discriminatory exclusion of women from jury service in vio-

lation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under Article I, Section Eight of the Virginia Constitution (1971), was denied and dismissed by order of the trial court entered October 19, 1972, to which we granted him a writ of error.

Assuming, without deciding, that Quick's allegations of systematic exclusion of women from jury service in Nelson County are supported by the evidence, we must first determine whether the trial court ruled correctly that Quick has no standing to object.

For many years it has been generally held that a criminal defendant in a state prosecution has no standing to object on constitution grounds to exclusion from the jury of a class to which he does not belong. *Fay v. New York*, 332 U.S. 261, 287(1947); see also *Alexander v. Louisiana*, 405 U.S. 625, 633(1972). The exclusion of women from federal juries has been invalidated, however, by the Supreme Court in the exercise of its supervisory power over the administration of justice in the federal courts. *Ballard v. United States*, 329 U.S. 187, 193(1946). See also *Thiel v. Southern Pacific Company*, 328 U.S. 217, 225(1946), where, on the same basis, the systematic exclusion of daily wage earners from a federal jury was invalidated.

Quick, relying on *Peters v. Kiff*, 407 U.S. 493 (1972), maintains that the Supreme Court has now accorded standing to a criminal defendant in a state court to object to the systematic exclusion from jury service of any identifiable group, whether or not he belongs to the group. We do not agree. Quicks' contention is based upon dicta in the opinion of Mr. Justice Marshall in which only two other justices concurred. The judgment of the Supreme Court in *Peters v. Kiff* was that a white defendant in a state court had standing to object to the systematic exclusion of black jurors. But Mr. Justice White, in a separate opinion in which two other justices joined, concurred in

the result on the ground that it would implement the statutory prohibition against racial discrimination in jury selection found in 18 U.S.C. §243. Mr. Chief Justice Burger and two other Justices dissented.

Under these circumstances we conclude that a majority of the Supreme Court does not approve the language in the Marshall opinion which might imply that a male defendant has standing in a state court to challenge the systematic exclusion of women. See *Sanders v. United States*, 357 F. Supp. 1055 (D. Md. 1973). We acknowledge but do not agree with the contrary view expressed in *White v. State*, 230 Ga. 327, ——, 196 S.E.2d 849, 853, *appeal dismissed*, —— *U.S.* ——, 94 S.Ct. 222(1973), and in *Mayfield v. Steed*, 345 F. Supp. 806 (E.D. Ark. 1972), *aff'd* 473 F.2d 691 (8th Cir. 1973), in each of which cases the court, in reliance on *Peters v. Kiff*, accorded standing to a male defendant to object to the exclusion of women. In *White*, however, the Supreme Court of Georgia affirmed the finding of the lower court that sexual discrimination had not been proved, and the Supreme Court of the United States dismissed an appeal for lack of a substantial federal question. In the absencee of a majority opinion in *Peters v. Kiff*, we construe that decision to be limited to cases involving discriminatory racial exclusion in the jury selection process.

Moreover, Quick is entitled to no relief unless *Peters v. Kiff* is given retroactive effect. This we decline to do.

The three-fold test for prospectivity when new standards of constitutional dimension are mandated by the Supreme Court requires appraisal of (a) the purpose to be served by the new standards, (b) the extent of reliance on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. *Stovall v. Denno*, 388 U.S. 293, 297(1967); *Linkletter v. Walker*, 381 U.S. 618, 636(1965); *Fountain v. Fountain*, 214 Va. 347, 348, 200 S.E.2d 513-14(1973); *Potts v. Superintendent*, 213 Va. 432, 434, 192 S.E.2d 780,

781(1972); *Bridgers v. Commonwealth*, 211 Va. 370, 371, 177 S.E.2d 526, 527(1970).

Under this test we find no basis for retroactive application of the doctrine of *Peters v. Kiff*. Where, as here, a new constitutional standard is not primarily intended to remedy unfairness at trial proceedings, the purpose of the new standard provides no strong argument for retroactive application. See *DeStefano v. Woods*, 392 U.S. 631, 633(1968), which gave prospective effect only to the rule of *Duncan v. Louisiana*, 391 U.S. 145(1968), that the Sixth Amendment's right to trial by jury extends to a state defendant. The reliance of our courts on old standards and the adverse effect on the administration of justice of retroactive application of the new rule lead us to conclude that the new rule should not be retroactively applied. Moreover, Mr. Justice White's opinion in *Peters v. Kiff* expressly states that the new rule should apply only in that case and in future proceedings. 407 U.S. at 507. *See People v. Sirhan*, 7 Cal.3d 710, 497 P.2d 1121(1972), and *Watson v. United States*, 350 F. Supp. 57 (N.D. Ga. 1972), *aff'd* 484 F2d 34 (5th Cir. 1973), both of which deny retroactive application to *Peters v. Kiff* on the basis of Mr. Justice White's opinion.

Cases cited by Quick to support his argument in favor of according full retroactivity to *Peters v. Kiff* are distinguishable or unpersuasive. The rule of *Peters v. Kiff* was not involved in either *Smith v. Yeager*, 465 F.2d 272 (3d Cir. 1972), *cert. den.*, 409 U.S. 1076(1972), or *Winters v. Cook*, 466 F.2d 1393 (5th Cir. 1972), cases in which black petitioners alleged discriminatory exclusion of blacks from jury service. In *Mayfield v. Steed*, *supra*, the court gave no reasons to justify retroactive application of its interpretation of the rule of *Peters v. Kiff*. Accordingly, we hold that the rule of *Peters v. Kiff* shall not be applied to criminal proceedings instituted before June 22, 1972, the date of that decision.

Affirmed.

Opinion and Order of the Circuit Court of Nelson County dated October 19, 1972.

VIRGINIA

IN THE CIRCUIT COURT OF NELSON COUNTY

FRED WILLIAM QUICK, JR.,
Petitioner

v.

CRIMINAL 1059
CRIMINAL 1059-A

WILLIAM M. HARRIS, Sheriff
of Nelson County
and
A. E. SLAYTON, JR., Superintendent
Virginia State Penitentiary,

Respondents

OPINION AND ORDER

This proceeding came on to be heard on September 22, 1972, upon the petition of Fred William Quick, Jr., for a writ of habeas corpus ad subjiciendum and the answers of the respondents, the petitioner appearing in person and by John C. Lowe, counsel of his own choosing, and the respondent William M. Harris appearing by Sam D. Eggleston, Jr., attorney for the Commonwealth for Nelson County and the respondent A. E. Slayton, Jr., appearing by Robert E. Shepherd, Jr., Assistant Attorney General. Whereupon, the Court heard the evidence and argument of counsel and upon reviewing the record and transcript of the proceedings in this Court on April 14, 1970, and June 26, 1970, which are hereby made a part hereof and, for the reasons stated from the bench at the conclusion of the hearing, the Court is of the opinion that the writ should not issue as prayed.

It is, therefore, ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and it is hereby, denied and dismissed, and the writ discharged, to all of which action of the Court, the petitioner, by counsel, objects and excepts. At the close of the aforesaid hearing, the petitioner stated is desire to appeal the decision of this Court and the appeal is hereby noted and the petitioner is continued on the bond with surety previously entered into by petitioner.

Let the Clerk of this Court certify a copy of this order to the petitioner, the respondents, to counsel for the petitioner, to Sam D. Eggleston, Jr., attorney for the Commonwealth for Nelson County and to Robert E. Shepherd, Jr., Assistant Attorney General of Virginia.

Enter this 19th day of October 1972.

/s/Judge C. G. Quesenbery
Judge

We ask for this:

/s/ Robert E. Shepherd, Jr.
Counsel for Respondent
A. E. Slayton, Jr.

/s/ Samuel Eggleston, Jr.
Counsel for Respondent
William M. Harris
Seen and objected to:

/s/ John C. Lowe
Counsel for Petitioner

BRIEF FOR THE RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-5858

FRED WILLIAM QUICK, JR.,

Petitioner,

v.

WILLIAM M. HARRIS, SHERIFF OF NELSON COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT:	
I. The Supreme Court Of Virginia Properly Ruled That The Petitioner Had No Standing Whatsoever To Raise The Issue Of Sex Discrimination In The Selection Of His Jury In 1970.	4
II. Even Assuming, Arguendo, That The Holding In *Peters* v. *Kiff, Supra,* Would Give This Petitioner Standing To Attack Alleged Sex Discrimination, That Decision Should Not Be Given Retroactive Effect Prior To June 22, 1972, And It Would Therefore Have No Effect So Far As This Petitioner Is Concerned.	9
III. Even Assuming, Arguendo, That *Peters* v. *Kiff, Supra,* Applies Retroactively To The Petitioner And That It Also Gives Him Standing To Attack Alleged Discrimination Against Women In The Jury Selection Process, The Petitioner Has Waived His Objection To The Alleged Systematic Exclusion Of Women From The Grand Jury That Indicted Him And The Petit Jury That Convicted Him By Not Asserting His Objections Prior To The Filing Of A Petition For A Writ Of Habeas Corpus.	11
IV. Even Assuming, Arguendo, That Petitioner Can Successfully Cross The Three Hurdles Discussed Above, It Is Respectfully Submitted That There Is No Constitutional Prohibition Against The Exclusion Of Women From Juries And The Petitioners' Argument On The Merits Would Be Moot.	13

Page

V. The Petitioner's Argument On Page 10 Of The Petition For A Writ Of Certiorari That He Should Prevail On The Merits If He Is Granted Standing Should Be Rejected Because If The Previous Four Hurdles Are Successfully Crossed, Any Action By This Court Should Be Limited To Remand To The Supreme Court Of Virginia So That An Evidentiary Hearing Could Be Held On The Merits Of The Issue As The Only Rulings Made To Date Solely To Standing And No Court Has Reached The Merits Of The Petitioner's Allegation. 15

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF CITATIONS

Cases

Alexander v. Louisiana, 405 U.S. 625 (1972) 5, 14

Bailey v. Commonwealth, 193 Va. 814, 71 S.E.2d 368 (1952)..11, 12

Ballard v. United States, 329 U.S. 195 (1946) 7

Bradley v. Texas, 470 F.2d 785 (5th Cir. 1972) 15

Davis v. United States, 411 U.S. 233 (1973) 11, 12

Fay v. New York, 332 U.S. 261 (1947) 6, 7, 13

Hill v. Texas, 316 U.S. 400 (1942) 5

Hoyt v. Florida, 368 U.S. 57 (1961) 14

Martin v. Florida, 389 F.2d 702 (5th Cir. 1974) 12

Mosley v. Smyth, 404 F.2d 346 (5th Cir. 1968) 15

People v. Sirhan, 7 Cal. 34d 710, 497 P.2d 1121 (1972) 10

Peters v. Kiff, 407 U.S. 493 (1972) 4, 5, 7, 8, 9, 10

Quick v. Harris, 214 Va. 632, 202 S.E.2d 869 (1974) 1

Page

Rivera v. Wainwright, 488 F.2d 275 (4th Cir. 1974) 12

State v. Enloe, ... La. ....., 276 S.2d 283 (1973) 15

Strauder v. West Virginia, 100 U.S. 303 (1879) 13, 14

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 7

Tollett v. Henderson, 411 U.S. 258 (1973) 11

United States v. Olsen, 473 F.2d 686 (8th Cir. 1973) 15

United States ex rel. Allum v. Twomey, 484 F.2d 740 (7th Cir. 1973) 12

Watson v. United States, 350 F.Supp. 57 (N.D. Ga. 1972), aff'd. 484 F.2d 34 (5th Cir. 1973) 10

White v. Georgia, ... U.S. ....., 14 Crim. L. Rptr. 4030 (October 15, 1973) 15

Other Authorities

Sixth Amendment, United States Constitution 2

Fourteenth Amendment, United States Constitution 2

18 United States Code § 243 .....4, 10

28 United States Code § 1257(3) 2

28 United States Code § 2255 11

Section 19.1-158, Code of Virginia (1950), as amended 11, 12

Section 19.1-201, Code of Virginia (1950), as amended 12

Rule 12(b)(2), Federal Rules of Criminal Procedure 11, 12

In The

Supreme Court of the United States

October Term, 1973

No. 73-1800

FRED WILLIAM QUICK, JR.,
Petitioner,

v.

WILLIAM M. HARRIS, SHERIFF OF NELSON COUNTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, William M. Harris, Sheriff of Nelson County, Virginia, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia entered in this case on March 4, 1974, not be granted.

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 214 Va. 632, 202 S.E.2d 869 (1974), and is set forth in the Appendix to the Petition for a Writ of Certiorari filed herein at pages 1a-4a.

JURISDICTION

Petitioner asserts that the jurisdiction of the Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether it was error to rule that Petitioner, a white male, had no standing to raise the issue of systematic exclusion of women from his trial jury in violation of the Constitution of Virginia and the Sixth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

On April 14, 1970, Fred William Quick, Jr., a white male, was tried by a Nelson County, Virginia, jury for the crimes of statutory burglary and grand larceny. At the time of his trial in 1970, the population of Nelson County between the ages of 21 and 70 was 50.4 percent female. The jury commissioners for Nelson County for the period during which the jury was drawn that tried petitioner were all males, as was the grand jury that indicted petitioner Quick. The jury panel drawn for the March, 1970, term of Court in Nelson County consisted of 28 names, of whom three were female so that the panel was 10.7 percent female, although the jurors who actually tried petitioner were all males.

The records of the Circuit Court of Nelson County do not reflect that the petitioner Quick ever objected to the composition of either the grand jury or the petit jury at the time of his trial on April 14, 1970. Quick was convicted by the jury and sentenced to serve a term of one year in the Virginia State Penitentiary on the charge of statutory burglary and 12 months on the charge of grand larceny,

said terms to run consecutively. He filed a petition for a writ of error in the Supreme Court of Virginia without raising any issue relative to the composition of the juries and a writ of error was denied by that Court on June 15, 1971. The petitioner subsequently filed a Petition for a Writ of Certiorari in this Honorable Court, again without any mention of either the grand or petit jury selection process, and on April 13, 1972, his Petition for a Writ of Certiorari was denied.

Quick subsequently filed a Petition for a Writ of Habeas Corpus in the Circuit Court of Nelson County on June 14, 1972, and an Order was entered on that same date directing the respondent to show cause why a Writ of Habeas Corpus should not issue. Counsel for the respondent, William M. Harris, Sheriff of Nelson County, filed a Motion to Dismiss dated June 16, 1972 and counsel for an additional respondent, A. E. Slayton, Jr., Superintendent of the Virginia State Penitentiary, filed an Answer dated July 13, 1972. A plenary hearing was held in the Circuit Court of Nelson County on September 22, 1972, at which point the Judge Designate of the Circuit Court ruled that the petitioner Quick had no standing to challenge the composition of the jury insofar as the alleged discrimination on the basis of sex was concerned and he declined to hear evidence on that point although evidence was adduced at the hearing on the question of the systematic exclusions of blacks from grand and petit juries in Nelson County, an issue which is not involved in this proceeding. The state Petition for a Writ of Habeas Corpus was the first point at which the jury discrimination issues were ever raised by the petitioner.

By Order of October 19, 1972, the Petition for a Writ of Habeas Corpus was denied and dismissed and the petitioner appealed to the Supreme Court of Virginia. A writ of error was granted by the Supreme Court of Virginia

and the matter was set down for a briefing and oral argument with the aforesaid judgment affirming the decision of the Circuit Court of Nelson County being entered on March 4, 1974.

ARGUMENT

I

The Supreme Court Of Virginia Properly Ruled That The Petitioner Had No Standing Whatsoever To Raise The Issue Of Sex Discrimination In The Selection Of His Jury In 1970.

Prior to the decision of this Honorable Court in *Peters* v. *Kiff*, 407 U.S. 493 (1972), Your Honors have always taken the position that an individual has no standing to challenge jury discrimination against a class of which he was not a member. The *Peters* case contained three opinions with Justice Marshall announcing the judgment of the Court in an opinion joined by Justices Douglas and Stewart in which he expressed a view that a state defendant had standing to challenge a jury selection system on the ground that it had arbitrarily excluded members of any race on due process grounds. Mr. Justice White wrote a concurring opinion joined by Justices Brennan and Powell in which he asserted the position that the strong statutory policy of 18 U.S.C. § 243, providing that no citizen shall be disqualified from serving on a federal or State grand or petit jury on account of race, should be implemented by permitting a white person to challenge a state court conviction on the ground that blacks were arbitrarily excluded from the Grand Jury that indicted him. Chief Justice Burger wrote a dissenting opinion joined by Justices Blackmun and Rehnquist, and that opinion was premised on the rationale that a defendant must demonstrate specific prejudice to him from the exclusion of a class from grand or petit jury service.

Passages of the two majority opinions are instructive on the question of standing. Justice Marshall's opinion recognized that:

> "This Court has never before considered a white defendant's challenge to the exclusion of Negroes from jury service." (407 U.S. at 497).

This statement was footnoted, and in that footnote Justice Marshall stated:

> "A number of state courts and lower federal courts have imposed a 'same-class' rule on challenges to discriminatory jury selection, holding that the exclusion of a class from jury service is subject to challenge only by a member of the excluded class. Only a few courts have rejected the rule. . . ." (407 U.S. at 497, fn. 4).

Justice White in his concurring opinion refers to the Court's prior decision in *Hill* v. *Texas,* 316 U.S. 400 (1942), and goes on to state:

> "It is true that the defendant in *Hill* was a Negro and petitioner here is a white man. It is also true that there is no case in this Court setting aside a conviction for arbitrary exclusion of a class of citizens from jury service where the defendant was not a member of the excluded class. I also recognize that, as in this case, the Courts of Appeal, reflecting the generally accepted constitutional view, have rejected claims such as petitioner presents here." (407 U.S. at 507).

Two-and-a-half months prior to the decision in the *Peters* case, the Court dealt with a jury discrimination issue in *Alexander* v. *Louisiana,* 405 U.S. 625 (1972), a case in which a black defendant, prior to his trial, had moved to quash the indictment because blacks were included on the grand jury list in only token numbers and females were systematically excluded from the grand juries. The Court

dealt with the racial discrimination argument but touched rather summarily on the sex discrimination issue and refused to reach it despite the strong urging of Justice Douglas. In his opinion for the Court, Justice White stated:

> "Petitioner also challenges the Louisiana statutory exemption of women who do not volunteer for grand jury service. Article 402, La. Code Crim. Proc. This claim is novel in this Court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. *Carter* v. *Jury Commission, supra.* But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service." (405 U.S. at 633).

Finally, in *Fay* v. *New York,* 332 U.S. 261 (1947), Mr. Justice Jackson, writing for the Court, pointed out that:

> "This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class. [Citing cases] Relief has been held unavailable to a Negro who objected that all white persons were purposely excluded from the grand jury that indicted him. *Haraway* v. *State,* 203 Ark. 912, 159 S.W.2d 733. Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendent." (332 U.S. at 287; see also *Salisbury* v. *Grimes,* 406 F.2d 50 (5th Cir. 1969); *Mosley* v. *Smyth,* 404 F.2d 346 (5th Cir. 1968); *Woodruff* v. *Breazeale,* 291 F.Supp. 130 (N.D. Miss. 1967), *aff'd.* 401 F.2d 997 (5th Cir. 1968);

Butler v. *State*, 285 Ala. 387, 232 So.2d 631 (1970); *Blanton* v. *State*, 249 Ark. 181, 458 S.W.2d 373 (1970), *cert. den.* 401 U.S. 1003 (1971); *State* v. *Lea*, 228 La. 724, 84 So.2d 169 (1955), *cert. den.* 350 U.S. 1007 (1965)).

Thus, until the decision in *Peters*, the question of standing was almost unanimously resolved against a person attempting to challenge alleged discrimination in jury selection where he or she was not a member of the class allegedly excluded.

The petitioner herein relies quite heavily upon the decisions of the Court in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946) and *Ballard* v. *United States*, 329 U.S. 195 (1946). However, petitioner's reliance on these decisions is quite misplaced insofar as his attempt to apply them to a state prosecution is concerned. This Court itself pointed out in *Thiel* that their holding was based on "the exercise of our power of supervision over the administration of justice in the federal courts." (328 U.S. at 225). Similarly, in the *Ballard* case, the Court stated:

> "We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts . . . to correct an error which permeated this proceeding." (329 U.S. at 193).

Mr. Justice Jackson clearly pointed to the inapplicability of *Thiel* and *Ballard* to State prosecutions in *Fay* v. *New York, supra:*

> "These defendants rely heavliy on arguments drawn from our decisions in *Glasser* v. *United States*, 315 U.S. 60; *Thiel* v. *Southern Pacific Company*, 328 U.S.

> 217; and *Ballard* v. *United States,* 329 U.S. 187. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process." (332 U.S. at 287).

However, the most essential question is whether the "standing" rationale of *Peters* is applicable to any jury discrimination cases other than those involving race. As previously pointed out, only three of the nine justices predicated the defendant's standing on due process. In order to make up a majority of the Court, it was necessary to rely on Justice White's concurring opinion which was joined by Justices Brennan and Powell. Justice White refused to rest the standing in the *Peters* case on any generalized concept of due process but instead rested the concurring opinion on the provisions of 18 U.S.C. § 243 which provides as follows:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; . . ."

Justice White further stated that he would:

> ". . . implement the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the ground

> that Negroes were arbitrarily excluded from the grand jury that indicted him." (407 U.S. at 507).

Justice White further stated that 18 U.S.C. § 243 clearly evinced an intention on the part of Congress to put:

> ". . . cases involving exclusions from jury service on grounds of race 'in a class by themselves . . . for us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination,' *Fay* v. *New York*, 332 U.S. 261, 282-283 (1947)." (407 U.S. at 505-506).

Thus, it would appear that the holding in *Peters*, insofar as a majority of the Court is concerned, is limited to giving standing to a criminal defendant to object to the exclusion of members of a class to which he does not belong from jury service only where that exclusion is based on "race, color, or previous condition of servitude." *Peters* would thus give no solace to this petitioner insofar as his claim of sex discrimination is concerned.

II.

Even Assuming, Arguendo, That The Holding In Peters v. Kiff, Supra, Would Give This Petitioner Standing To Attack Alleged Sex Discrimination, That Decision Should Not Be Given Retroactive Effect Prior To June 22, 1972, And It Would Therefore Have No Effect So Far As This Petitioner Is Concerned.

Since the decision of this Honorable Court in *Peters* v. *Kiff, supra,* there have been few cases dealing with the question of the retroactive application of that decision to cases tried prior to the announcement of the decision in that case. At least two courts have considered the question of the retroactivity of *Peters* and have determined that it

should only apply to cases arising after the *Peters* decision (*People* v. *Sirhan,* 7 Cal. 3rd 710, 497 P.2d 1121 (1972); *Watson* v. *United States,* 350 F.Supp. 57 (N.D. Ga. 1972), *aff'd.* 484 F.2d 34 (5th Cir. 1973)). In addition, during the course of Mr. Justice White's concurring opinion in *Peters,* he asserted, as previously discussed, that the petitioner should be able to implement the stattuory policy of 18 U.S.C. § 243 by challenging his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. Mr. Justice White then goes on to conclude his concurring opinion with the following sentences:

> "This is the better view, and it is time that we now recognized it *in this case and as the standard governing criminal proceedings instituted hereafter.* Hence, I joined the judgment of the court." (407 U.S. at 507; emphasis supplied).

Mr. Justice Marshall, in his opinion announcing the judgment of the Court does not disagree with Mr. Justice White's announcement of a policy decision which would clearly appear to preclude retroactivity. It is, therefore, respectfully submitted that the plan language of the *Peters* case controls the determination of the retroactivity question and this petitioner would not receive the benefits of the *Peters* decision even if it were applicable to the standing question on a charge of sex discrimination.

III.

Even Assuming, Arguendo, That Peters v. Kiff, Supra, Applies Retroactively To The Petitioner And That It Also Gives Him Standing To Attack Alleged Discrimination Against Women In The Jury Selection Process, The Petitioner Has Waived His Objection To The Alleged Systematic Exclusion Of Women From The Grand Jury That Indicted Him And The Petit Jury That Convicted Him By Not Asserting His Objections Prior To The Filing Of A Petition For A Writ Of Habeas Corpus.

The Virginia Supreme Court has consistently ruled that an attack on the composition of a grand jury or petit jury must be made at the appropriate time during the criminal proceedings against a defendant and cannot be initially raised on appeal (*Bailey* v. *Commonwealth*, 193 Va. 814, 71 S.E.2d 368 (1952), cert. den. 344 U.S. 886 (1952)). The waiver concept embodied in *Bailey* has been expressly approved by Your Honors in the recent decisions in *Davis* v. *United States*, 411 U.S. 233 (1973) and *Tollett* v. *Henderson*, 411 U.S. 258 (1973). The *Davis* case was a federal proceeding under 28 U.S.C. § 2255 where the petitioner was initially raising his objection to the grand jury selection process in a post-conviction collateral proceeding, a method in contravention of Rule 12(b)(2) of the Federal Rules of Criminal Procedure which provide in pertinent part that "defenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such a defense or objection "constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver." Your Honors held in *Davis* that the failure to comply with Rule 12(b)(2) precluded an initial collateral attack on the jury selection process. Virginia has had statutory counterparts to Rule 12(b)(2) which are set forth in § 19.1-158 of the Code of Virginia (1950), as amended,

which applies to grand juries and § 19.1-201 which applies to petit juries. Section 19.1-158 provides:

> *"No irregularity in any writ of venire facias, in the drawing, summoning, returning or impanelling of jurors,* in making out or copying or signing or failing to sign the list or in drawing more persons than four in excess of the number to be summoned *shall be cause for summoning a new panel or for setting aside a verdict or granting a new trial, unless objection thereto specifically pointed out was made before the jury was sworn, and unless it appears that such irregularity, error or failure was intentional or such as probably to cause injustice to the Commonwealth or to the accused;* and no judgment shall be arrested or reversed for the failure of the record to show that there was a venire facias, unless made a ground of exception in the trial court before the swearing of the jury." (Emphasis supplied.)

These statutory provisions are every bit as specific, if not indeed more so, than Federal Rule of Criminal Procedure 12(b)(2), and it is respectfully submitted that the holding in the *Bailey* case, as amplified by this Honorable Court's decisions in *Davis* and *Tollett,* precludes petitioner's attack on the jury selection process during the post-conviction stage of the proceedings (see *Rivera* v. *Wainwright,* 488 F.2d 275 (4th Cir. 1974); *Marlin* v. *Florida,* 489 F.2d 702 (5th Cir. 1974); *United States ex rel. Allum* v. *Twomey,* 484 F.2d 740 (7th Cir. 1973)).

IV.

Even Assuming, Arguendo, That Petitioner Can Successfully Cross The Three Hurdles Discussed Above, It Is Respectfully Submitted That There Is No Constitutional Prohibition Against The Exclusion Of Women From Juries And The Petitioner's Argument On The Merits Would Be Moot.

In 1879 this Court decided the case of *Strauder* v. *West Virginia,* 100 U.S. 303 (1879), which was one of the earliest cases decided by this high court regarding the question of jury discrimination. During the course of that decision, Mr. Justice Strong made the following statement:

> "We do not say that, within the limits from which it is not excluded by the Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. *It may confine the selection to males,* to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color." (100 U.S. at 310; emphasis supplied).

Obviously, since the *Strauder* case involved a question of racial discrimination, Justice Strong's language quoted was merely *dictum.* However, it is *dictum* that has survived the passage of almost one hundred years. In *Fay* v. *New York, supra,* Mr. Jusice Jackson made the following statements:

> "The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion of the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state

> law they are eligible but women jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood." (332 U.S. at 290).

Fourteen years later, in *Hoyt* v. *Florida,* 368 U.S. 57 (1961), Your Honors unanimously affirmed a criminal conviction of a woman against her contention that a Florida statute was unconstitutional which granted women an absolute exemption from jury duty, based solely on their sex, by providing that they were not to be put on the jury list unless they had voluntarily registered for jury service. Mr. Justice Harlan, for the Court, said:

> "We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this Court's dictum in *Strauder* v. *West Virginia,* 100 U.S. 303, 310, to the effect that a State may constitutionally 'confine' jury duty 'to males.' This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the Court, see *Fay* v. *New York, supra* (332 U.S. at 289, 290), and had been reflected, until 1957, in congressional policy respecting jury service in the federal courts themselves. Even were it to be assumed that this question is still open to debate, the present case tenders narrower issues." (368 U.S. at 60).

As may be seen from the capsule description of the Florida statute set forth above, the Florida legislation was far more restrictive than Virginia's insofar as exemption from jury service was concerned. In *Alexander* v. *Louisiana, supra,* the Court refused to consider the continued validity of the *dictum* in *Strauder,* despite Justice Douglas's urgings that

this issue be joined (see 405 U.S. at 634-635). Thus, it is respectfully submitted that the petitioner's allegations, even if proven after crossing the three prior hurdles, would be of no avail. (See *Bradley* v. *Texas*, 470 F.2d 785 (5th Cir 1972); *Mosley* v. *Smyth*, 404 F.2d 346 (5th Cir. 1968); *State* v. *Enloe*, ... La. ....., 276 S.2d 283 (1973); *United States* v. *Olsen*, 473 F.2d 686, 687 (8th Cir. 1973); see also *White* v. *Georgia*, ... U.S. ..... 14 Crim. L. Rptr. 4030 (October 15, 1973)).

V.

The Petitioner's Argument On Page 10 Of The Petition For A Writ Of Certiorari That He Should Prevail On The Merits If He Is Granted Standing Should Be Rejected Because If The Previous Four Hurdles Are Successfully Crossed, Any Action By This Court Should Be Limited To Remand To The Supreme Court Of Virginia So That An Evidentiary Hearing Could Be Held On The Merits Of The Issue As The Only Rulings Made To Date Solely To Standing And No Court Has Reached The Merits Of The Petitioner's Allegation.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 28th day of August, 1974, I mailed three copies of the foregoing Brief for the Respondent in Opposition to the Granting of a Petition for a Writ of Certiorari to John C. Lowe, Esquire and F. Guthrie Gordon, III, Esquire, Lowe and Gordon, Ltd., 1111 W. Main Street, Charlottesville, Virginia 22903, counsel of record for petitioner.

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